RECENT CASE NOTES

ALIENS—NATURALIZATION—ERRONEOUS SPECIFICATION OF SOVEREIGN—ORDER NUNC PRO TUNC—An application for citizenship was made by a supposed German subject. Section 3 of the Naturalization Act of June 25, 1910, requires a declarant to express the intention "to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name, to the prince, potentate, state or sovereignty of which the alien may be at the time a citizen or subject." The declarant in the principal case, after the general renunciatory clause, renounced allegiance particularly to "William II, Emperor of Germany." At the hearing it appeared that the petitioner was a French citizen. By an order *nunc pro tunc* the words "French Republic" were substituted for "William II, etc." and citizenship was thereupon decreed. The United States brought a petition to cancel the certificate of naturalization. *Held,* that the petition should be allowed, because the *nunc pro tunc* order and final decree were erroneous. *United States v. Vogel* (Dec. 10, 1919) C. C. A. 2d, Oct. Term. 1919, No. 29.

The function of a *nunc pro tunc* order in judicial proceedings is to bring the record into conformity with the facts and not to supply retroactively a missing fact. *Liddell v. Landau* (1908) 87 Ark. 438, 112 S. W. 1085. Accordingly courts have sometimes refused *nunc pro tunc* corrections of declarations of intention in naturalization proceedings. *In re Lewkowicz* (1909, S. D. N. Y.) 169 Fed. 927. *Contra, In re Markowitz* (1916, E. D. Pa.) 233 Fed. 715; *United States v. Orend* (1915, W. D. Pa.) 221 Fed 777. Such a correction has been refused, much more questionably, even when the error was purely clerical, the oral declaration itself having complied with legal requirements. *In re Hennig* (1918, E. D. N. Y.) 248 Fed. 990 (error as to date of birth). The 200 Fed. 330. On the other hand, a supplementary paper correcting an error of the declarant not so material as to vitiate the final decree has been allowed. *In re Hennig* (1918, E. D. N. Y.) 248 Fed. 990 (error as to date of birth.) The decision in the principal case seems sound, insofar as it involves a reversal of the *nunc pro tunc* order. The further holding that the specific renunciation prescribed is an indispensable part of the declaration of intention can hardly be criticised in view of the express language of the statute. See *United States v. Vogel, supra,* 362, 363; *cf. Ex parte Lange* (1912, E. D. Mo.) 197 Fed. 769; *cf. In re Stack, supra.* Inasmuch as the record in the case, barring the erroneous *nunc pro tunc* order, disclosed German nationality, this would be sufficient to support the decision under Comp. Stat. 1916, sec. 4352, the petition having been filed subsequently to April 6, 1917. *United States v. Meyer* (1917, C. C. A. 2d) 241 Fed. 305. From the language of the opinion, however, it is inferable that the court regarded the petitioner's case as irremediable by any amendment of the petition, or by a new petition, with an averment of French citizenship. Such a conclusion, based upon the ground that the declarant must decide at his peril the identity of his allegiance, would be contrary to some well considered decisions. *Cf. United States v. Orend, supra; In re Denny* (1917, S. D. N. Y.) 240 Fed. 845; *cf. In re Markowitz, supra; cf. United States v. Viaropulos* (1915, W. D. Pa.) 221 Fed. 485. *Contra, In re Friedl, supra; In re Lewkowicz, supra.* The specific renunciatory clause, prescribed by Congress in addition to the general renunciation of allegiance, could serve no rational purpose except that of additional specification. No legislative disposition to insist upon a correct knowledge of the identity of the declarant's allegiance is indicated by the mere fact that the specification is required. *Cf. In re Denny, supra; cf. In re Hennig, supra.* Such a legislative intention is rendered the more improbable in view

of the formidable legal difficulties so frequently involved in deciding between conflicting claims of allegiance.

ALIENS—PHILOSOPHICAL ANARCHISTS—DEPORTATION.—The petitioner, an alien philosophical anarchist, was heard before the immigration authorities and an order for his deportation was issued under the Act of Congress of Feb. 5, 1917, ch. 29, 39 Stat. L. 874, which provides for the deportation of "any alien who at any time after entry shall be found advocating or teaching . . . anarchy." It appeared that petitioner did not believe in violence under any circumstances but merely claimed the privilege, which he undertook to exercise, of propagating through lectures the theory that society would be better off without government. The petitioner applied for a writ of *habeas corpus*. *Held*, that the writ should be denied since the order for deportation was proper. *Lopez v. Howe* (1919, C. C. A. 2d) 259 Fed. 401.

The petitioner was admitted by the court to belong to the "class of honest and law-abiding visionaries, who are convinced that the interest of society would be promoted by the abolition of all government whatsoever. Their propaganda is purely educational in character and violence does not enter into it." Yet, as Congress had made no discrimination between philosophers and preachers of violence in describing "anarchists" subject to deportation, the court felt constrained to affirm the order. There seems no doubt that every government must have the privilege to preserve itself against disruptive agencies; and the *mores* of the time must determine what such agencies are. Beliefs and opinions not sufficiently in harmony with the *mores*, if deemed disruptive, must perforce, it would seem, be suppressed although the penalizing of mere opinion seems mediaeval. Difficulties in administration arise during transitional periods of changing *mores*, when the agencies deemed disruptive grow in variety and power. But if the oral teacher of philosophic anarchy is expelled—and this would seem a defensible policy—must we not logically suppress the more powerful influence of the books of Proudhon, Tolstoi, Ferrer, Zola, Kropotkin, and others by establishing an *index expurgatorius?* The privilege to exclude or expel aliens considered deleterious to the public welfare is inherent in all government. *Fong Yue Ting v. United States* (1893) 149 U. S. 698, 13 Sup. Ct. 1016. In the United States the grounds of exclusion and expulsion are prescribed by statute. Act of February 20, 1907, 34 Stat. L. 898; February 5, 1917, 39 Stat. L. 874, Act of Oct. 16, 1918, Public No. 221, 65th Cong. The same is true of Great Britain and Brazil. Great Britain, Aliens Act of 1905, 5 Edw. VII, ch. 13; Brazil, Law of January 7, 1907, (1908) 4 *Rev. de Droit Int. Privé*, 855, U. S. For. Rel. 1907, I, 113. While the terms of the statutes are broad, most governments have not by enumeration of specific grounds limited their freedom of action; for example, Italy, Germany, Roumania, etc. Martini, *L'Expulsion des étrangers* (Paris, 1909) 42ff. The petitioner in the instant case had resided in the United States fifteen years. In several countries a domiciled alien cannot be expelled. Thus, in Belgium and Venezuela the domiciled alien and in Brazil, the alien who has resided in the country two years, is exempt. Belgium, Law of Feb. 12, 1897; Halot, *Traité des étrangers en Belgique* (Bruxelles, 1900); Brazil, Instructions of May 23, 1907, in execution of the law of Jan. 7, 1907, (1910) 37 Clunet, 1377; Venezuela, Law of April 16, 1903, art. 6; Borchard, *Diplomatic Protection of Citizens Abroad* (1915) sec. 27. Possibly these statutes may recently have been amended. Until 1910 the time for deportation of undesirable aliens was limited in the United States to three years after arrival. By the amendment of March 26, 1910, 36 Stat. L. 263, alien prostitutes or those bringing in women for immoral purposes are deportable any time. *United States v. Czeslicki* (1913, M. D. Pa.) 209 Fed. 496. By the act of 1917 the period of limitation was removed from those advocating

"anarchy." The grounds of expulsion have covered a wide range and include: spreading socialistic propaganda (*Jaurès* case, Germany, 1905, 4 Moore's *Dig.* 69); promoting and organizing a strike (*Ben Tillett* case, Belgium, 1896, (1899) 26 Clunet, 203); practising the art of healing without a license (*Edwards'* case, Belgium, 1900, 4 Moore's *Dig.* 83); writings or speeches derogatory to the government or the army (cases of *Father Forbes* in France, (1892) 19 Clunet, 405; *Hottmann* in Switzerland, (1894) 21 Clunet, 672; *Kennan* in Russia, 1901, 4 Moore's *Dig.* 94), preaching polygamy (*Mormon missionaries* in Germany, For. Rel. 1898, p. 347); anarchy (*Kropotchine* case in Switzerland (1882) 9 Clunet, 220; *United States ex rel. Turner v. Williams* (1904) 194 U. S. 279, 24 Sup. Ct. 719) and many others. Attempts have been made by governments to agree on uniform administrative measures for exercising surveillance over anarchists. For. Rel. 1901, 196. Until the *mores* change, anarchists can not expect toleration from organized governments. They are inherently undesirable.

BAILMENTS—LIMITATION OF BAILEE'S LIABILITY—LOSS OF BAGGAGE IN CHECK ROOM.—A bill was filed to recover the sum of $224.50, the alleged value of a suit-case and its contents, which the complainant deposited at the defendant's check room in its station. The bag and its contents were given to another person by mistake and had not been returned. The defence was that there was a notice on the face of the check given to the complainant to the effect that the defendant would not be responsible for an amount exceeding ten dollars on any article covered by the check. *Held,* that the complainant should recover the full value of the suit-case and its contents. *Dodge v. Nashville C. & St. L. Ry.* (1919, Tenn.) 215 S. W. 274.

The problem in the instant case is different from that in the usual case, where the carrier, in conjunction with the ticket issued to each passenger, allows a certain amount of baggage to be carried, for which a baggage check is given limiting the liability of the carrier in case of loss. The weight of authority in the latter cases is that the carrier cannot avoid or lessen its responsibility by mere notice upon the check, unless the passenger's attention is actually drawn to the limitation. *Cooper v. Norfolk Southern R. R.* (1913) 161 N. C. 400, 77 S. E. 339; *Rawson v. Pennsylvania R. R.* (1872) 48 N. Y. 212; Browne, *Law of Bailments* (1896) 191; see (1913) 23 YALE LAW JOURNAL, 95; (1916) 26 *ibid.*, 414. In the instant case the carrier was not acting in the regular capacity of a carrier, but in the capacity of a bailee for hire, and as such could limit its liability, provided the bailor had actual knowledge and assented. But the defendant contended that the printed notice on the check was binding whether the passenger read it or not. Such is the rule in England. *Harris v. Great Western Ry.* (1876) 1 Q. B. D. 515; *Pratt v. South Eastern R. R.* [1897] 1 Q. B. 718. The cases on this point are rare in the United States. Where a check was given at a check room with a printed notice thereon, limiting liability to ten dollars, it has been held insufficient notice and the full amount was recovered. *Healy v. New York Central & H. R. R.* (1912, Sup. Ct.) 153 App. Div. 516, 138 N. Y. Supp. 287; *contra, Terry v. Southern Ry.* (1908) 81 S. C. 279, 62 S. E. 249. The suit in the instant case was brought in equity under a Tennessee statute. Shannon's Code (Thompson ed. 1918) sec. 6109.

BANKRUPTCY—PROPERTY ACQUIRED BY TRUSTEE—FORFEITURE OF LEASE.—A coal lease provided for forfeiture and reëntry upon breach of conditions, such as the payment of royalties, taxes, etc. The lessee corporation failed to comply with these conditions and subsequently it was adjudged an involuntary bankrupt. Demand was made on the trustee in bankruptcy, who refused to perform the covenants in the lease. The lessors thereupon declared the lease forfeited

and reëntered the premises and the trustee peaceably surrendered possession. He then filed a petition seeking an order to restrain the lessors from enforcing the forfeiture. *Held,* that the trustee was not entitled to relief. *In re Elk Brook Coal Co.* (1919, D. Pa.) 44 Am. B. Rep. 283.

Under section 70a of the Bankruptcy Act a trustee takes "title" to a lease held by the bankrupt only in case he elects to accept it within a reasonable time after his appointment. If he does not elect to accept, the lease remains the property of the bankrupt. *In re Frazer* (1910, C. C. A. 1st) 183 Fed. 28. In such case the bankrupt continues to be liable on his covenant for the payment of rent, taxes, royalties, etc., accruing after the petition in bankruptcy, the landlord's right arising from such covenants not being a provable claim within section 63a of the act. *In re Roth & Appel* (1910, C. C. A. 2d) 181 Fed. 667. See Hine, *The Effect of Failure to Perform Contracts Made Prior to Receivership* (1914) 24 YALE LAW JOURNAL, 111, 119. It is within the discretion of the trustee whether to accept or reject a lease burdened with obligations. *In re Cogley* (1901, D. Iowa) 107 Fed. 73. If he elects to accept, he takes subject to all claims and defects existing at the time of adjudication. *Chattanooga National Bank v. Rome* (1900, C. C. N. D. Ga.) 102 Fed. 755. The vital question presented in the principal case is whether or not the adjudication in bankruptcy operated to prevent the lessors from exercising their power to enforce a forfeiture as provided by the terms of the lease. It has been held that where notice of forfeiture is served before the adjudication, the bankruptcy court will by decree enforce the forfeiture and order the trustee to surrender the property. *Lindeke v. Associates Realty Co.* (1906, C. C. A. 8th) 146 Fed. 630. The same rule would seem to apply even though the power were not exercised until after the adjudication, and the principal case appears sound, especially in view of the fact that the trustee's peaceful surrender of the property might well be treated as an election on his part to reject the leasehold.

CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACT—EFFECT OF STATE STATUTE ON MUNICIPAL FRANCHISE CONTRACT.—The defendant street railway accepted the terms of a municipal franchise ordinance passed in 1902 and agreed to sell working people half-fare tickets good on all cars during certain hours. State "anti-pass" legislation of 1907 forbade all such discrimination. The defendant then refused to carry out its agreement. This bill was brought by the city to obtain a mandatory injunction. *Held,* that the bill should be dismissed. *Dubuque Electric Co. v. City of Dubuque* (1919, C. C. A. 8th) 260 Fed. 253.

It is well established that a city may have the power to make valid franchise contracts. *Vicksburg v. Vicksburg Waterworks Co.* (1906) 206 U. S. 496, 27 Sup. Ct. 762; *Cleveland v. Cleveland City Ry.* (1904) 194 U. S. 512, 24 Sup. Ct. 756. And even increased war costs may not justify the public utility in refusing to perform. *Columbus Ry. Power & Light Co. v. City of Columbus* (1919) 249 U. S. 399, 39 Sup. Ct. 349; (1919) 28 YALE LAW JOURNAL, 826. Nor may the city disregard its duties arising from the contract. *Vicksburg Waterworks Co. v. Vicksburg* (1904) 202 U. S. 453, 26 Sup. Ct. 661. It might seem that Article I, section 10 of the federal Constitution would prevent any impairment of such contracts by state action. But a municipal corporation is merely a political sub-division of the state. *Covington v. Kentucky* (1899) 173 U. S. 231, 19 Sup. Ct. 383; *East Hartford v. Hartford Bridge Co.* (1850, U. S.) 10 How. 511. Its rights and duties, etc., arising from contracts therefore may be changed at the will of the state. *City of Pawhuska v. Pawhuska Oil & Gas Co.* (1919, U. S.) 39 Sup. Ct. 526. In such case, however, the assent of the other contracting party must be obtained or the state law may be invalid as an impairment of contract. *Von Hoffman v. City of Quincy* (1867, U. S.) 4 Wall. 535. The constitutional difficulty in the principal case is usually avoided, however, by holding

that the contract was made with an implied reservation in favor of the proper exercise by the state of its police power. *Sioux City Street Ry. v. Sioux City* (1891) 138 U. S. 98, 11 Sup. Ct. 226. *Cf. In re Searsport Water Co.* (1919, Me.) 108 Atl. 452. The state may on that ground annul contracts between a public utility and its patron where the contract rate has become unreasonable. *Union Dry Goods Co. v. Georgia Public Service Corporation* (1919) 248 U. S. 372, 39 Sup. Ct. 117. And the public utility has been allowed in such case to refuse performance on its own initiative. *V. & S. Bottle Co. v. Mountain Gas Co.* (1918) 261 Pa. 523, 104 Atl. 667. But if the utility is to be considered to have contracted regarding its rates, it would seem the contract duty should be binding until the state has acted. *Manitowoc v. Manitowoc & Northern Traction Co.* (1911) 145 Wis. 13, 129 N. W. 925. The decision in the principal case is clearly sound on either of the two grounds.

CONTRACTS—THIRD PARTY BENEFICIARY—MATERIALMEN'S BONDS.—A state statute required contractors with municipalities to execute a bond for the payment of all subcontractors and materialmen. The contractor demanded a bond from his subcontractor, which was issued with the defendant company as surety, reciting that it was as provided by the above statute and was for the benefit of materialmen and others. The plaintiff furnished materials to the subcontractor for which it was never paid. It then sued the defendant surety who contended that the plaintiff should not recover because it was not a subcontractor. *Held,* that the plaintiff should not recover. *Carolina Portland Cement Co. v. Carey & Boettner* (1919, La.) 82 So. 887.

The court held that the bond was not required by the above mentioned statute, and that hence the question was one of construction of a common law bond. By the Code of Louisiana a third party beneficiary to a contract can recover. Civil Code of La. Art. 1902. And the trend of authority seems to favor recovery by materialmen on such bonds. *Cf. Builders Lumber & Supply Co. v. Chicago Bonding & Surety Co.* (1918) 167 Wis. 167, 166 N. W. 320; *cf. Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.* (1905) 113 La. 1091, 37 So. 980; see also COMMENT (1919) 28 YALE LAW JOURNAL, 798. But the court in the instant case reasoned that the bond must be construed *strictissimi juris,* and that since it referred to the statute, the intention was that the plaintiff should not be protected by it. It seems well settled, however, that this rule does not apply to bonds written by surety and insurance companies. Their bonds, like contracts of insurance, are to be construed against them. *United States v. Lynch* (1912, D. Del.) 192 Fed. 364; *American Surety Co. v. Pauly* (1898) 170 U. S. 133, 18 Sup. Ct. 552; see COMMENT (1917) 26 YALE LAW JOURNAL, 320; (1918) 28 *ibid.,* 193. And in view of the fact that the bond expressly bound the defendant in favor of "all subcontractors under said subcontractors" and of "furnishers of materials," it would seem to include the plaintiff in its terms. Hence the plaintiff should have been allowed to recover as third party beneficiary. The mention of the statute in the bond only tends to show that the parties thought they were legally bound to make the bond. That they had misinterpreted the statute would seem to be an insufficient reason for overriding the express terms of the bond as against one who thereafter furnished materials to the principal.

DAMAGES—DECLINE IN VALUE OF STOCK DURING LITIGATION.—The plaintiff sued the defendant to set aside a sale of bank stock as fraudulently made to defeat execution on their judgment against the transferor. During the litigation the stock declined in value. The transfer was set aside and the proceeds from the sheriff's sale were less than they would have been had the stock been sold at the beginning of the suit. The plaintiff then brought this action to recover

the resulting loss. *Held,* that he should not recover. *Clivier v. Majors* (1919, La.) 83 So. 23.

The Louisiana law provides that where the transfer of the debtor's property to a third person to defeat judgment creditors is simulated or fictitious, the creditor can immediately seize the property so conveyed without suing to annul the transfer. *Gaidry v. Lyons* (1877) 29 La. Ann. 4. But where there has been an *actual* transfer of the property, as in the instant case, the creditor must sue to annul it. *Johnson v. Kingsland and Ferguson Mfg. Co.* (1886) 38 La. Ann. 248. In most jurisdictions, in such case, the creditor has concurrent remedies in law and equity. See 20 *Cyc.* 655, note 79. He may bring a creditor's bill to have the transfer set aside. *Planters and Merchants' Bank v. Walker* (1845) 7 Ala. 926; *Sullickson v. Madsen* (1894) 87 Wis. 19, 57 N. W. 965. Or he may enforce a lien on the property or levy execution thereon as though title were still in the debtor. *Jackson v. Holbrook* (1887) 36 Minn. 494, 32 N. W. 852; *Smith v. Reid* (1892) 134 N. Y. 568, 31 N. E. 1082. He can thus obtain immediate benefit of the property. Where he has his choice of remedies and brings suit to set aside the conveyance, he should not be heard to complain that he suffered a loss through the decline in value of the property, because he elected to take the slower procedure. But in the present case the plaintiff had no such choice. His only remedy was to pursue the revocatory action, which forced him to delay till the suit was settled, and had to bear the resulting loss. In this respect, the law in Louisiana does not seem to give the creditor as adequate a remedy as that of the other jurisdictions.

DAMAGES—PERSONAL INJURIES—LOSS OF EARNING POWER—PROFITS FROM BUSINESS.—The plaintiff sued the defendant for personal injuries. The plaintiff was engaged in the tea and coffee business in which he employed three clerks and had a moderate wagon trade. Proof of a decrease of profits in the business was admitted to show the plaintiff's loss of earning capacity. *Held,* that such admission was error. *Dempsey v. the City of Scranton* (1919, Pa.) 107 Atl. 877.

The plaintiff's husband was a wagon builder and employed four or five workmen and a minor son, but had no capital invested in his business except in tools and material. A suit was brought for his wrongful death after he had been killed in a railroad accident. Evidence was admitted that the decedent had set aside $1,800 from profits each year for the support of his family. *Held,* that this was not error, since the decedent was engaged in a business predominatingly personal. *Baxter v. Philadelphia and Reading R. R.* (1919, Pa.) 107 Atl. 881.

The courts distinguish between businesses involving the investment of capital and those depending primarily upon the personal activity of the owner. *Cf. Mahoney v. Boston Elevated Railway Co.* (1915) 221 Mass. 116, 108 N. E. 1033, (1915) 25 YALE LAW JOURNAL, 83. In the former, profits derived from the business can not be shown as a measure of earning power. *Pryor v. Metropolitan Street Railway Co.* (1900) 85 Mo. App. 367. In this class of cases, proof of decrease in earnings is admissible, but the courts limit earnings to the money received for services performed. *Cf. Chicago, Rock Island and Pacific R. R. v. Stubbs* (1906) 17 Okla. 97, 87 Pac. 293. The first of the principal cases falls in this class and is in line with the general rule. The second of the principal cases represents a modification of this rule. Evidence of profits may be admitted where the element of personal earnings predominates in the business over the investment of an insignificant capital. *Kronold v. City of New York* (1906) 186 N. Y. 40, 78 N. E. 572 (business depending on orders for Swiss embroideries); *Fraser v. the City of Buffalo* (1908) 123 App. Div. 159, 108 N. Y. Supp. 127 (merchant tailor employed workmen by the piece to make clothes cut out

by him). The decision in each case depends upon the nature of the business and whether the predominating factor in the business is the directing or the physical and intellectual labor of the individual. In the following cases evidence of profits was excluded because of the amount of capital invested. *Weir v. Union Ry.* (1907) 188 N. Y. 416, 81 N. E. 1178 (small restaurant or lunch business); *Gombert v. New York Central & H. R. R.* (1909) 195 N. Y. 273, 88 N. E. 382 (building contractor employing at times both material and labor); *York v. City of Everton* (1906) 121 Mo. App. 640, 97 S. W. 604 (plaintiff engaged in millinery business). The second of the principal cases seems to take a liberal view of what constitutes a business predominatingly personal.

GIFTS—REVOCATION—BY FATHER AS NATURAL GUARDIAN.—A father opened separate bank accounts in the names of his four minor children and made deposits on the accounts during a period of several years. He communicated this fact to the children and showed the pass books to them. Two of the children testified that they occasionally had the pass books in their possession, but it did not appear that they ever exercised any control over them. The father drew out the money without the knowledge of the children and loaned it to the president of the bank, taking his individual notes, payable to the children, which notes were never paid. One of the children brought an action against the bank to recover the amount which had been deposited in his name. *Held,* that he should recover, the bank having paid the money to the father without authority. *McKinnon v. First National Bank of Pensacola* (1919, Fla.) 82 So. 748.

When one deposits money in the name of another with the intention to make a gift, it is not necessary for the completion of the gift that the depositor turn the pass book over to the donee. *Meriden Trust and Safe Deposit Co. v. Miller* (1914) 88 Conn. 157, 90 Atl. 228; *Blasdel v. Locke* (1872) 52 N. H. 238. Some act of acceptance by the donee is necessary, such as communication to and acquiescence by him. *Roughan v. Chenango Valley Spring Bank* (1913, Sup. Ct.) 158 App. Div. 786, 144 N. Y. Supp. 508; *Beaver v. Beaver* (1889) 117 N. Y. 421, 22 N. E. 940. These requirements were fulfilled in the principal case and were reënforced by the rule that a transaction between father and child will be construed as gift upon the slightest evidence. *Jones v. Jones* (1918, Mo. App.) 201 S. W. 557; *Love v. Francis* (1886) 63 Mich. 181, 29 N. W. 843. Once having made the gift, it was not within the power of the father to extinguish the bank's debt without the consent of the children. As natural guardian, the father has a right to the custody of his child. *Matter of Galleher* (1905) 2 Calif. App. 364, 84 Pac. 352; *Jain v. Priest* (1917) 30 Ida. 273, 164 Pac. 364. In fact, a contract by which the father releases to another the custody of his child is revocable at the parent's election. *In re Galleher, supra.* But this right to the custody of the child's person is the limit of natural guardianship. The relation confers no control over the child's property. *Vineyard v. Heard* (1914, Tex. Civ. App.) 167 S. W. 22; *Ringstad v. Hanson* (1911) 150 Iowa, 324, 130 N. W. 145. The decision in the principal case would seem amply justified inasmuch as the bank had full notice of the children's interest in the bank accounts.

INTERSTATE COMMERCE—GOVERNMENT CONTROL OF TELEGRAPH LINES—LIABILITY FOR UNREPEATED MESSAGES.—The defendant by contract with the sender limited its responsibility for missending an unrepeated message. An error was made in the transmission and this action was brought by the plaintiff, who sent the message, to recover damages under the state common law, which held such contracts to be void. *Held,* that he should not recover, because such contracts were beyond the control of the state. *Postal Telegraph-Cable Co. v. Warren-Godwin Lumber Co.* (1919) 40 Sup. Ct. 69.

This case, in accord with the weight of authority in the state courts, determines that by the Amendment of June 18, 1910 (36 Stat. L. 539) to the Commerce Act of 1887 all state regulation of the interstate transmission of telegraphic messages which is inconsistent with the rules obtaining in the federal courts, is suspended. See (1919) 28 YALE LAW JOURNAL, 831. The unrepeated message from its very inception has been sent under a limited rate and subject to a limited responsibility. *Clay County Produce Co. v. Western Union* (1917) 44 Int. Com. Rep. 670. By this federal Act, express authority is given the company to classify messages into "day, night, repeated and unrepeated—and to charge reasonable rates for the different classes of messages." The power to establish just rates carried with it the primary authority to provide a rate for unrepeated telegrams, and also the power to fix a reasonable limitation of responsibility where such rate was charged. *Cf. Primrose v. Western Union* (1894) 154 U. S. 1, 14 Sup. Ct. 1098. As pointed out in the instant case, this would seem to indicate that Congress intended to control the whole field covering the regulation of interstate telegrams. *Western Union v. Lee* (1917) 174 Ky. 210, 192 S. W. 70; *contra, Western Union v. Boegli* (1917, Ind.) 115 N. E. 773. This conclusion is fortified by the fact that only through such an interpretation would the uniformity and equality of rates contemplated by the Amendment be possible, for otherwise such contracts would be subject to the control of conflicting state laws. Hence it is submitted that the instant decision is not only in accord with the intent and purpose of the Act, but also with the general tendency to completely liberate all subjects of interstate commerce from state interference. See (1920) 29 YALE LAW JOURNAL, 456.

JUDGMENTS—FULL FAITH AND CREDIT—JURISDICTION.—The plaintiff recovered a judgment by default in Nebraska upon an insurance policy. A Nebraska statute provided that any person who caused a policy to be issued or received, and receipted for any payment thereon, should be deemed an agent of the company. The present action was debt upon the Nebraska judgment. It appeared in evidence that the defendant maintained its only office in Chicago; that it had no paid solicitors, but policies were issued only upon the recommendation and solicitation of its members; and that service in Nebraska was made upon a member who had previously secured two policies in that state. *Held,* that the plaintiff should not recover, because the Nebraska court did not have jurisdiction in the former case. *Pembleton v. Illinois Commercial Men's Ass'n* (1919, Ill.) 124 N. E. 355.

It is well settled that the "full faith and credit" clause of the Constitution does not preclude inquiry into the jurisdictional facts of a judgment. The judgment may be attacked collaterally, either as to the jurisdiction of the person or the subject-matter. *Thompson v. Whitman* (1873, U. S.) 18 Wall. 457; *Simmons v. Saul* (1890) 138 U. S. 439, 11 Sup. Ct. 369; *National Exchange Bank v. Wiley* (1904) 195 U. S. 257, 25 Sup. Ct. 70. The recital of jurisdictional facts in the record shows only *prima facie* jurisdiction, and is open to collateral attack. *Thompson v. Whitman, supra.* For a criticism and refinement of this rule, see COMMENT (1919) 28 YALE LAW JOURNAL, 579. A state may provide, as a condition precedent to doing business within its borders, that a corporation must consent to service upon its agent in the state as equivalent to service on the corporation. A judgment based on such service is entitled to full faith and credit. *Lafayette Ins. Co. v. French* (1855, U. S.) 18 How. 404; *Mutual Reserve Fund Life Ass'n v. Phelps* (1902) 190 U. S. 147, 23 Sup. Ct. 707. For such statutes to confer jurisdiction, it must appear that the corporation was doing business within the state. *Old Wayne Mutual Life Ass'n v. McDonough* (1906) 204 U. S. 8, 27 Sup. Ct. 236; *Commercial Mutual Accident Co. v. Davis* (1909) 213 U. S. 245, 29 Sup. Ct. 445; *Connecticut Mut. Life*

Ins. Co. v. Spratley (1899) 172 U. S. 602, 19 Sup. Ct. 308. Although the result in the principal case works a hardship on the policy holders, it is in accord with the authorities. The question of jurisdiction was before the court, and the Nebraska statute could not control because the appellant was found not to be doing business within that state.

JUDGMENTS—STARE DECISIS—RES JUDICATA—LAW OF THE CASE.—The plaintiff purchased an automobile from a retail dealer and was injured by the collapse of a defective wheel. He sued the manufacturer and secured a large judgment. On the first appeal, the appellate court reversed the decision of the trial court and held that since there was no contractual relationship between the parties, there was no "liability." On the second appeal, the identical case, cause of action, and parties again came before the same court. *Held,* that the plaintiff should recover. Ward, J., *dissenting. Johnson v. Cadillac Motor Car Co.* (1919, C. C. A. 2d) October Term 1919, No. 20.

The doctrine of *stare decisis* is that when a court has once laid down a principle as applicable to a certain state of facts it will adhere to that principle and apply it to all future cases where the facts are substantially the same. *Cf. Moore v. City of Albany* (1885) 98 N. Y. 396; *cf. Menge v. The Madrid* (1889, C. C. E. D. La.) 40 Fed. 677. However, it is well settled that courts are privileged to depart from this doctrine when it is necessary to do so in order to prevent the perpetuation of a palpable error. *Calhoun Gold Mining Co. v. Ajax Gold Mining Co.* (1899) 27 Colo. 1, 59 Pac. 607; *Pitcock v. State* (1909) 91 Ark. 527, 121 S. W. 742; see COMMENT (1918) 27 YALE LAW JOURNAL, 668. The doctrine of *res judicata* is that when a final judgment has been rendered on the merits of a cause of action, by a competent tribunal, it cannot be litigated again by the same parties. *Cf. Williamsburgh Savings Bank v. Town of Solon* (1893) 136 N. Y. 465, 32 N. E. 1058; *cf. Mitchell v. First Natl. Bk. of Chicago* (1901) 180 U. S. 471, 21 Sup. Ct. 418; *cf. Sly v. Hunt* (1893) 159 Mass. 151, 34 N. E. 187. *Res judicata* has reference to the facts of a case. See *Sawyer v. Woodbury* (1856) 73 Mass. 499, 502; see *Citizens' Bank v. Brigham* (1900) 61 Kan. 727, 731, 60 Pac. 754, 755. While *stare decisis* has reference to the legal principle involved. See *Oliver Co. v. Louisville Realty Co.* (1913) 156 Ky. 628, 640, 161 S. W. 570, 575; see *In re Preisers Will* (1913, Surr. Ct.) 79 Misc. 668, 671, 140 N. Y. Supp. 844, 846. The doctrine of *res judicata* could not be invoked in the instant case as no final judgment had ever been entered. But by the great weight of authority, all questions which were decided by a court of final resort on the first appeal become the law of the case and are not subject to review on the second appeal. *McKinney v. State* (1888) 117 Ind. 26, 19 N. E. 613; *City of Hastings v. Foxworthy* (1895) 45 Neb. 676, 63 N. W. 955. The instant case in holding that this rule is not inexorable, is in accord with some authority. *Missouri, K. & T. Ry. v. Merrill* (1902) 65 Kan. 436, 70 Pac. 358; see *Bird v. Sellers* (1894) 122 Mo. 23, 32, 26 S. W. 668, 670. It is submitted to be sound. For when a palpably erroneous doctrine has been established on the former appeal and the appellate court is convinced that the evils of adherence to it are manifestly greater than those of departure, it would seem that the sensible thing to do is to correct the error at the first opportunity. For a discussion of an automobile manufacturer's liability to third parties, see (1916) 25 YALE LAW JOURNAL, 679.

LANDLORD AND TENANT—COVENANT NOT TO SUBLET—ASSIGNMENT.—A leased his premises to B. The lease contained a covenant not to sublet, but no covenant forbidding an assignment. B assigned his lease to the defendant, who took possession. The plaintiff purchased the premises from A and, during the term prescribed by the lease, brought an action of unlawful detainer. *Held,* that the

action must fail because an assignment was not a breach of the covenant against subletting. *Goldman v. Daniel Feder & Co.* (1919, W. Va.) 100 S. E. 400.

A transfer by the lessee of an estate less than his own, leaving a reversion in himself, is a sublease. *Stewart v. Long Island Ry.* (1886) 102 N. Y. 601, 8 N. E. 200; *St. Joseph & St. L. Ry. v. St. Louis, I. M. & S. Ry.* (1896) 135 Mo. 173, 36 S. W. 602. But a transfer of the lessee's entire interest in the whole of the premises is an assignment. *Craig v. Summers* (1891) 47 Minn. 189, 49 N. W. 742; *Hogg v. Reynolds* (1901) 61 Neb. 758, 86 N. W. 479. In the absence of a statute, a sublessee can maintain no action against the original lessor for a breach of a covenant in the lease. *Ganson v. Tifft* (1877) 71 N. Y. 48. And he is not liable to the lessor on the covenants of the original lease. *McFarlan v. Watson* (1850) 3 N. Y. 286; *Dunlap v. Bullard* (1881) 131 Mass. 161. But the assignee of a lease gets the benefits of any covenants of the original lease, and can sue the lessor direct for any breach which occurs during the period of his ownership. *McClenahan v. Gwynn* (1811, Va.) 3 Munf. 556; *Cleveland C. C. & St. L. Ry. v. Wood* (1901) 189 Ill. 352, 59 N. E. 619. And he is liable to the lessor for breaches of the lessee's covenants which occurred after the assignment. *Howland v. Coffin* (1831) 29 Mass. 125; *Salisbury v. Shirley* (1884) 66 Calif. 223, 5 Pac. 104. In the absence of a statutory prohibition or of a provision in the lease to the contrary, a lessee is privileged to assign or to sublet. *Ray v. Johnson* (1893) 98 Mich. 34, 56 N. W. 1048; *Crowe v. Riley* (1900) 63 Oh. St. 1, 57 N. E. 956. But a provision of the lease expressly denying the power to assign or sublet is valid. *Indianapolis Manufacturing Carpenters' Union v. Cleveland C. C. & I. Ry.* (1873) 45 Ind. 281; *Shannon v. Grundstaff* (1895) 11 Wash. 536, 40 Pac. 123. However, restraints upon alienation are strictly construed against the lessor. *Hilsendegen v. Hartz Clothing Co.* (1911) 165 Mich. 255, 130 N. W. 646; *Burns v. Dufresne* (1912) 67 Wash. 158, 121 Pac. 46; see (1920) 29 YALE LAW JOURNAL, 360. Accordingly, a subletting is not a breach of a covenant not to assign. *Hargrave v. King* (1848) 40 N. C. 430; *Moore v. Guardian Trust Co.* (1903) 173 Mo. 218, 73 S. W. 143. The instant case, in holding the converse, is in accord with the great weight of authority. *Lynde v. Hough* (1857, N. Y. Sup. Ct.) 27 Barb. 415; *Burns v. Dufresne* (1912) 67 Wash. 158, 121 Pac. 46. And because of the substantial differences between an assignment and a sublease, such a construction is submitted to be sound.

MARRIAGE AND DIVORCE—ANNULMENT—ALIMONY PENDENTE LITE AND COUNSEL FEES—SUIT BY RELATIVES OF DECEASED HUSBAND.—The plaintiffs, relatives of a deceased husband, sought to annul his marriage with the defendant under section 1747 of the Code of Civil Procedure, which allows a relative who has an interest to avoid a marriage to sue for annulment on the ground of lunacy after the death of the lunatic and during the life of the other spouse. The statute is silent as to alimony and counsel fees. The defendant asked for alimony *pendente lite* and counsel fees. An allowance was made by the lower court out of a trust fund of which the deceased was the life-tenant, with remainder to his heirs-at-law and next of kin, the trustee, however, not being a party to this suit. *Held* (two judges *dissenting*), that alimony and counsel fees should be denied. *Farnham v. Farnham* (1919, N. Y.) 124 N. E. 894.

The question of the allowance of alimony *pendente lite* and counsel fees to the wife depends on whether the marriage was valid, and which party brings the action. It is agreed by the courts that if it is admitted that the marriage is void *ab initio*, temporary alimony and counsel fees will not be allowed. *Sinclair v. Sinclair* (1898, Ct. Err.) 57 N. J. Eq. 222, 40 Atl. 679; *Knott v. Knott* (1902, N. J. Ch.) 51 Atl. 15. Where the husband brings an action for annulment and the wife insists that the marriage is valid, alimony *pendente lite* and counsel

fees will be allowed on the theory that the marriage remains valid until the court declares it invalid. *Vroom v. Marsh* (1878, Ct. Err.) 29 N. J. Eq. 15; *North v. North* (1845, N. Y.) 1 Barb. Ch. 241, 43 Amer. Dec. 778; *Ricard v. Ricard* (1909) 143 Iowa, 182, 121 N. W. 525, 26 L. R. A. (N. S.) 500, note. But where the action is brought by the wife, the majority of courts refuse to allow her temporary alimony and counsel fees on the ground that the wife is estopped to claim support by her allegations that the marriage is a nullity. *Bloodgood v. Bloodgood* (1880, N. Y. Sup. Ct.) 59 How. Prac. 42; *Jones v. Brinsmade* (1905) 183 N. Y. 258, 76 N. E. 22, 3 L. R. A. (N. S.) 192, note. A very strong minority attacks this estoppel theory and allows alimony and counsel fees to the wife where she institutes the suit. *Allen v. Allen* (1880, N. Y. Sup. Ct.) 59 How. Prac. 27; *Lea v. Lea* (1889) 104 N. C. 603, 10 S. E. 488. The request for alimony by the defendant in the instant case is novel because the suit is brought after the death of the husband by his relatives. In an action by a parent to annul the marriage of her infant son, alimony was not allowed to the defendant, on the ground that the plaintiff was a stranger to the defendant as far as alimony is concerned. *Stivers v. Wise* (1897) 18 App. Div. 316, 46 N. Y. Supp. 9. Though the statute under which the suit in the principal case was brought, does not provide for alimony, the court could have made compliance with an order directing alimony a condition precedent to the decree of annulment, since it was an equitable action. The majority of the court argued, however, that alimony is based on the duty of the husband to support his wife; that the duty ceases on his death; and that the relatives being strangers to the wife, there is no reason to make such a requirement. The dissent contended that the action was more than a mere attempt to obtain property, since it attacked defendant's status as a lawful wife and the legitimacy of her child (But the Code of Civil Procedure allows the court to declare a child legitimate) and the child's inheritance; and that therefore the relatives who made such an attack in the hope of pecuniary gain should be subjected to the liability of counsel fees, as the husband would be if he were alive and bringing the suit. This argument seems very persuasive, though it is not clear how the order directing the payment from the trust fund can be justified, the trustee not being a party to the suit.

MUNICIPAL CORPORATIONS—RAILROAD CROSSINGS—LIABILITY FOR DAMAGE.—The plaintiff owned certain lots on the Milwaukee side of a street, the center line of which was the boundary between the town of Lake and the city of Milwaukee. He brought this action to recover damages for the removal of soil occasioned by cutting down the level of the street so as to make it run under the tracks of the defendant's intersecting railroad. The city charter conferred power on the city council "to require railroad companies to construct at their own expense such bridges . . . tunnels, etc., at public railroad crossings as the city council might deem necessary." The construction of the subway had been authorized by an ordinance in which extended privileges were granted the railroad on condition that it construct several subway crossings of which this was one. The ordinance expressly provided that the defendant "should be at no cost or expense for any work outside of its right of way." *Held,* that the plaintiff should recover. *Application of Kaiser* (1919, Wis.) 174 N. W. 714.

The court found no difficulty with the claim of the plaintiff to damages, so the only question was whether the city or the railroad was under a duty to pay same. The decision rested entirely on the interpretation given to a similar charter provision in a previous case. *Superior v. Roemer* (1913) 154 Wis. 345, 141 N. W. 250. The court there held that the charter provision gave the city power to authorize construction only at the expense of the railroad and that the city had no power to assume a duty to pay any part of the expense. That

the decision in the principal case is based upon this denial of power is shown by a similar case where the plaintiff who owned a lot on the other side of the street, in the town of Lake, was not allowed to recover against the railroad. *Application of Doss* (1919, Wis.) 174 N. W. 718. In that case the supervisors of the town had express power to make an agreement with railroad companies to share in the expense of changing a grade crossing. The decision in the principal case is sustained by authority. *Northern Pacific Ry. v. State ex rel. Duluth* (1908) 208 U. S. 583, 28 Sup. Ct. 341; *State ex rel. Minneapolis v. St. Paul M. & M. R. R.* (1906) 98 Minn. 380, 108 N. W. 261. The courts have construed the power granted to municipal, as well as to private, corporations strictly. See 1 McQuillin, *Municipal Corporations* (1911) sec. 353. Where no power is granted none will be implied, unless it is necessary to support express powers of the municipality. See *Dailey v. City of New Haven* (1891) 60 Conn. 314, 22 Atl. 945; *Flannagan v. Buxton* (1911) 145 Wis. 81, 129 N. W. 642. There was no necessity in the instant case to imply a power to undertake a duty to contribute to the expense, since the city by its express powers could compel the railroad to construct the crossing at its own expense. *Chicago, M. & St. P. R. R. v. Fair Oaks* (1909) 140 Wis. 334, 122 N. W. 810; *Chicago, B. & Q. R. R. v. Nebraska* (1897) 170 U. S. 57, 18 Sup. Ct. 513.

PLEADING—MISNOMER OF PARTIES—AMENDMENTS.—The Michigan Railway Company leased its road to the Grand Trunk Railway Company, which company operated it under the name of the Grand Trunk Railway System. The plaintiff brought an action for injury to property against the Grand Trunk Railway System. The service of summons was made on the Michigan Railway Company. At the trial the attorney for the Grand Trunk Railway Company entered a plea of the general issue on behalf of the Grand Trunk Railway System and, after the plaintiff's evidence was all in, moved for a directed verdict, which was granted. The plaintiff's motion to amend the pleadings by substituting the name of the Grand Trunk Railway Company for the Grand Trunk Railway System was refused. *Held,* that such refusal was correct, because a misnomer of a defendant is not amendable where the intended defendant was not served and did not make a general appearance. *Parke, Davis & Co. v. Grand Trunk Railway* (1919, Mich.) 174 N. W. 145.

Where the cause of action remains the same, a misnomer of either party may be amended, if service was made upon the intended party. *Martin v. Martin* (1897) 95 Va. 26, 27 S. E. 810; *Maher v. Interstate Switch Co.* (1897) 58 Kan. 817, 51 Pac. 286. By the weight of authority, a plaintiff may amend his action so as to change the capacity in which he sues from individual to representative, or *vice versa*. *Johnson v. Phoenix Bridge Co.* (1910) 197 N. Y. 316, 90 N. E. 953; *Mann v. Marshall* (1911) 76 N. H. 162, 80 Atl. 336. *Contra, Lower v. Segal* (1897, Sup. Ct.) 60 N. J. L. 99, 36 Atl. 777; *Walker v. Lansing Traction Co.* (1906) 144 Mich. 685, 108 N. W. 90. The defendant is likewise so privileged. *Hutchinson v. Tucker* (1878) 124 Mass. 240; *Tighe v. Pope* (1878, N. Y. Sup. Ct.) 16 Hun, 180. Similarly, an action brought by an individual may be changed by an amendment into one by a partnership, or *vice versa*. *Hodges v. Kimball & Farnsworth* (1878) 49 Iowa, 577; *York v. Nash* (1903) 42 Ore. 321, 71 Pac. 59; *contra, Blackwell v. Pennington & Sons* (1880) 66 Ga. 240. Also an amendment charging defendants as partners instead of as a corporation may be allowed. *Haggerty v. Strong* (1898) 10 S. D. 585, 74 N. W. 1037; *Teets v. Snider Heading Mfg. Co.* (1905) 120 Ky. 653, 87 S. W. 803. The principle of the instant case is clearly correct; but it would seem that the fact that the attorney who entered the plea was the general attorney for the Grand Trunk Company, and that the Grand Trunk Company operated under the name of the Grand Trunk System, which did not exist as a corporation, would be sufficient to

establish a *prima facie* agency for this particular action between this attorney and the company, and thus constitute a general appearance for the company. A general appearance cures all defects in service where the court would have had jurisdiction if the service had been perfect. *Redmond v. Peterson* (1894) 102 Calif. 595, 36 Pac. 923; *Baker v. Union Stock Yards Nat. Bank* (1902) 63 Neb. 801, 89 N. W. 269.

PLEADING—WRONGFUL DEATH—STATUTORY PERIOD—CONDITION PRECEDENT OR LIMITATION PERIOD.—Suit was brought November 28, 1910, under a wrongful death statute requiring that action thereon must be brought within one year after the death. The declaration alleged that the injury resulting in death occurred June 27, 1909, but did not allege the date of the death, nor that the action was commenced within one year after the death. *Held,* that the declaration did not state a cause of action. *Hartray v. Chicago Railways* (1919, Ill.) 124 N. E. 849.

One line of cases holds that a statutory requirement of this sort is a limitation period to be set up in the defendant's pleading. *Sharrow v. Inland Lines, Ltd.* (1915) 214 N. Y. 101, 108 N. E. 217; *Chiles v. Drake* (1859, Ky.) 2 Met. 146, 74 Amer. Dec. 406. But most courts treat such a provision as a limitation or condition attached to the right. *De Martino v. Sieman* (1916) 90 Conn. 527, 97 Atl. 765; *Korb v. Bridgeport Gas Light Co.* (1917) 91 Conn. 395, 99 Atl. 1048; *The Harrisburg* (1886) 119 U. S. 199, 7 Sup. Ct. 140; *Boston and Maine R. R. v. Hurd* (1901, C. C. A. 1st) 108 Fed. 116, 47 C. C. A. 615; *Hamilton v. Hannibal and St. Joseph R. R.* (1888) 39 Kan. 56, 18 Pac. 57. These cases reason since there is no action at common law for wrongful death, then where a statute creates a right of action, a limitation in the statute is inherently a part of the right of action. In this respect the limitation differs from the ordinary statute of limitations, which operates to bar a preëxisting right. See Tiffany, *Death by Wrongful Act* (2d ed. 1913) sec. 121. According to this view, in order to avail himself of the right, a plaintiff must affirmatively allege that his action was commenced within the period provided. *Louisville and Nashville R. R. v. Chamblee* (1910) 171 Ala. 188, 54 So. 681. When the plaintiff fails to do this, his declaration is demurrable. *Lapsley, Admtx. v. Public Service Corporation of New Jersey* (1908, Sup. Ct.) 75 N. J. L. 266, 68 Atl. 1113. The principal case follows the majority rule, and is sound in result. For the effect of a foreign statute of limitations, see (1918) 27 YALE LAW JOURNAL, 1078.

PROCEDURE—SERVICE BY PUBLICATION—IDEM SONANS.—The plaintiff sued to foreclose his mortgage on the defendant's property, service in the suit being by publication. The defendant contended that the court failed to obtain jurisdiction because of defective notice. The published notice named the defendant as "Asa W. Winegar," whereas his name was "Aseph W. Winegar." There was evidence that he had frequently been called "Asa" and that his name so appeared in the previous directory. *Held,* that there was not sufficient variation in the sound of the two names to make the service void. *Bennett v. Winegar* (1919, Neb.) 174 N. W. 512.

The courts are practically unanimous in applying the doctrine of *idem sonans* when called upon to determine the validity of default judgments rendered upon personal service. *Bloomfield R. R. v. Burress* (1882) 82 Ind. 83; *Walsh v. Kirkpatrick* (1866) 30 Calif. 202. But where service was made by publication, there is considerable conflict of opinion as to whether or not the doctrine should be applied. The more recent authorities tend to support the principal case. *Cf. Puckett v. Hetzer* (1910) 82 Kan. 726, 109 Pac. 285; *cf. Davison v. Bankers' Life Ass'n* (1912) 166 Mo. App. 625, 150 S. W. 713. *Contra,*

Hubner v. Reickhoff (1897) 103 Iowa, 368, 72 N. W. 540; *Schoenfeld v. Bourne* (1909) 159 Mich. 139, 123 N. W. 537. In general, the decisions *contra* are based on the ground that since such service was unknown to the common law and depends entirely on statutory provisions, power so granted must be strictly construed. Where notice was had by publication in proceedings to sell real estate for taxes, there is still greater tendency not to apply the doctrine. *Cf. Emeric v. Alvarado* (1891) 90 Calif. 444, 27 Pac. 356; *cf. Myers v. DeLisle* (1914) 259 Mo. 506, 168 S. W. 676. A reasonable way to settle the problem is to determine from the circumstances in each case, whether a reasonable man would have been put on notice by reading the publication. A recent case adopted substantially this view. *Ordean v. Grannis* (1912) 118 Minn. 117, 136 N. W. 575. It was there held that if the names when printed looked sufficiently alike to the eye, so that neither the defendant nor those who knew him could be misled, the service would be valid, although the true name and the name given were not strictly *idem sonans*.

PROPERTY—ESCHEAT—CONFLICT OF LAWS.—One Forney died intestate in California, of which state he was a resident, leaving deposits in banks in Nevada. The public administrator of Nevada reported no heirs and recommended the escheat of the property to that state. An illegitimate daughter of the decedent, who had always lived in California, then applied for the property on the ground that according to the law of Nevada she had been legitimated. *Held,* that she had no right to the estate, because her legitimation was governed by the law of California, under which she could not inherit. Sanders, J., *dissenting*. *In re Forney's Estate* (1919, Nev.) 184 Pac. 206.

One Clifford died intestate in Minnesota, leaving personal property in North Dakota. The administrator reported that the two surviving sisters were unlocated, and that the state should receive the whole property by escheat. The probate court decreed accordingly. The sisters then appeared and secured a modification of the decree, and applied to the State Treasurer, trustee of the fund, to have it turned over to them. He refused and they sued him and the state. *Held,* that they should recover. *Delaney v. State* (1919, N. D.) 174 N. W. 290.

Escheat is now principally regulated by statute. By the feudal theory of common law, when a man died intestate without inheritable blood the estate vested in the state at once by operation of law. See 4 Kent, *Commentaries* (13th ed. 1884) 424; 15 L. R. A. (N. S.) 382, note. As indicated in the note last cited, however, some courts with a more modern view made a judicial proceeding necessary before the state could vest title in itself or its grantee. This was later accomplished by statute in some jurisdictions, among them North Dakota, California, and Nevada, as is seen in the principal case. This seems the correct solution even without a statute, since in modern times the state does not take by succession, but by want of succession, by complete failure of title. If in fact there are neither heirs nor kindred, the death of the intestate is the operative fact which gives the state the right that his property shall escheat. But there appears no reason why the state should not be required to vindicate its right at law, like one who is heir-at-law. See 10 R. C. L. 609 ff. It is to be noted that the fiction as to the situs of personal property is dispensed with in the case of escheat, which is the usual result when that fiction conflicts with the law of the state wherein the property is situated. See Beale, *The Situs of Things* (1919) 28 YALE LAW JOURNAL, 525, 528.

PUBLIC SERVICE COMPANIES—TELEGRAPHS—SENDER'S CONTRACT AS BINDING RECEIVER.—The defendant company received the following message for transmission. "Prospects look higher for hogs selling fifty-five to-day." The mes-

sage was sent "unrepeated" and subject to the usual limitations of liability on the part of the company on such messages, i. e., damages to be limited to the amount paid for transmission and notice of claims to be filed within sixty days. When received by the plaintiff, the addressee, it read "ninety-five" instead of "fifty-five." He sought to recover the damages resulting. *Held,* that he should recover full damages. *Western Union Telegraph Co. v. Hanlen* (1919, Ind. App.) 125 N. E. 45.

The damages recoverable by a sendee for misdelivery or nondelivery of a telegram necessarily depends in the first instance on the court's view as to the effect of the company's fault on the relations of sender and sendee. See (1918) 27 YALE LAW JOURNAL, 1091, 932. But it has been held, as in the principal case, that since the rights of the sendee of a telegram arise in tort, out of a breach of public duty on the part of the company, they have no connection with the contract made by the sender with the company. See (1917) 26 *ibid.*, 252; *Webbe v. Western Union* (1897) 169 Ill. 610, 48 N. E. 670; *Pacific Telegraph Co. v. Underwood* (1893) 37 Neb. 315, 55 N. W. 1057. Most jurisdictions, however, limit the secondary duty of the company to pay damages to the terms of the contract made by it with the sender. Some base this limitation on the ground that the rights of the receiver arise as those of a third party beneficiary of the contract and must be limited to its terms. *Manier v. Western Union* (1891) 94 Tenn. 442, 29 S. W. 732; *Stone & Co. v. Postal* (1910) 31 R. I. 174, 76 Atl. 762. A better view is held by those courts which admit that the company is under a public duty analogous to that of a common carrier, but maintain that the contract made by the sender, to the extent that its provisions have been held to be reasonable and not contrary to public policy, limits the duty which the law imposes on the company to the public. *Broom v. Western Union* (1905) 71 S. C. 506, 51 S. E. 259; *Western Union v. Dant* (1914) 42 D. C. App. 398. The effect of the decision in the principal case is to render all the provisions of limited liability null and void as regards the receiver. While in a technical sense the addressee did not deal with the company in fixing the terms of the service, the company did in fact serve both sender and addressee. If the terms of that service are reasonable as regards one party, there is no reason why they are not reasonable as regards the other. According to the principal case the company is under a far greater liability to the public than it is to its patrons. It is difficult to believe that public utilities commissions which pass on the reasonableness of the terms of these contracts could have intended that result.

QUASI-CONTRACTS—TAXES PAID UNDER VOID STATUTE—RECOVERY AGAINST TAX COLLECTOR.—The plaintiff paid, under protest, taxes to the defendant state treasurer according to the provisions of a state statute. This statute, which provided drastic penalties for non-payment, was later declared unconstitutional. The defendant had already paid the amount collected into the state treasury. The plaintiff then brought this action against the defendant personally to recover the money paid in response to his demands. *Held,* that recovery should be allowed. *International Paper Co. v. Burrill* (1919, D. Mass.) 260 Fed. 664.

Generally the payment of an illegal tax, under protest but with full knowledge of the facts and without any duress, cannot be recovered by the taxpayer. *Brunson v. Board of Directors* (1913) 107 Ark. 24, 153 S. W. 828; see Ann. Cas. 1915A 495, note. Much diversity of opinion exists as to what sets of circumstances fulfill the "duress" requirement. See Woodward, *Quasi-Contracts* (1913) ch. 17; Thurston, *Cases in Quasi Contract* (1916) 548. A payment of an illegal tax made under an immediate and urgent necessity in order to protect the person or property of the payor is deemed duress. *Wheeler v. Plumas County* (1906) 149 Calif. 782, 87 Pac. 802. Some courts hold there

is no duress until some actual measures are taken to enforce collection. *Miner v. Clifton Township* (1912) 30 S. D. 127, 137 N. W. 585. But it has often been held, as in the instant case, that a payment, under protest, of an illegal tax to avoid the accrual of heavy penalties for delay is duress, though no proceedings have been taken or threatened. *Atchison, etc., Ry. v. O'Connor* (1911) 223 U. S. 280, 32 Sup. Ct. 216; *Underwood Typewriter Co. v. Chamberlain* (1917) 92 Conn. 199, 102 Atl. 600. To hold otherwise would mean a costly impediment to business, since such payments are practically compulsory. Because suit could not be maintained against the state, recovery was sought in the principal case against the collector. And a state official who has committed an unconstitutional act under color of authority from the state is not shielded by the state's immunity from suit. See *Nevada, etc., Co. v. Hamilton* (1916, D. Nev.) 235 Fed. 317, 322. So taxes invalidly assessed and paid, as in the instant case, are recoverable if the collector understands the payor regards them as illegal. *Erskine v. Van Arsdale* (1872, U. S.) 15 Wall. 75; *Atchison, etc., Ry. v. O'Connor, supra.* Otherwise the plaintiff would be remediless, whereas the collector will usually be reimbursed by statute or appropriation.

WILLS—INTERPRETATION—"LEGAL HEIRS AND NEXT OF KIN"—GIFT OF REMAINDER.—The testatrix gave her residuary estate in trust to her son for life, and at his death to be distributed "among my legal heirs and next of kin who shall be by law entitled to the same as though I died intestate." *Held,* that the nephews and nieces of the testatrix took the corpus of the estate to the exclusion of the son's widow. *Oleson v. Somogyi* (1919, N. J. Ch.) 107 Atl. 798.

The usual rule is that unless the testator has otherwise indicated, one is not excluded from taking a remainder as heir because also named as the life tenant. *Re Wilson* [1907] 1 Ch. 450, [1907] 2 Ch. 572; *Thomas v. Castle* (1904) 76 Conn. 447, 56 Atl. 854; *Ford v. Ford* (1915) 220 Mass. 322, 107 N. E. 948; *Bache's Estate* (1914) 246 Pa. St. 276, 92 Atl. 304. But see *Wilde v. Bell* (1913) 86 Conn. 610, 87 Atl. 8. As stated in the principal case, "the natural presumption is overcome by the legal presumption which arises from the use of technical words." A protracted attempt upon the part of a life tenant to terminate a trust in her favor by invoking this rule was unsuccessful. *Ackerman v. Union & New Haven Trust Co.* (1915) 90 Conn. 63, 96 Atl. 149; (1917) 91 Conn. 500, 100 Atl. 22. In the principal case, the court quite properly was astute in discovering an intention other than that presumed under the technical rule, though its result hardly accords with *Re Wilson, supra.* The court relied mainly upon the discretion given to the son's trustees to use from the corpus, a provision unnecessary if he was to take as sole heir; on the use of the word "shall" in connection with heirs as indicating an intention that heirs should be ascertained at the son's, rather than at the death of the testatrix (*sed quaere,* in view of the expression "entitled to the same as though I died intestate"); and on the direction for distribution "among" the heirs, which showed that more than one person was contemplated.

WORKMEN'S COMPENSATION ACT—ACCIDENTAL VIOLENCE TO PHYSICAL STRUCTURE—RUPTURE CAUSED BY VOMITING.—One Clark was employed by the defendant company as a night watchman. He was found dead in the company's mine one morning, with his clothes on fire. The referee found that his death was caused by a rupture of the *aorta* due to "an extra effort in vomiting," and that the vomiting was due to either noxious gases, the smell of his burning clothes or fright at discovering that his clothes were burning. It was also found that he was syphilitic; that, while he might have lived four or five years, he was susceptible to a rupture of the *aorta* and might have died at any time. Clark's wife sued for compensation for his death. *Held,* that she should recover. *Clark v. Lehigh Valley Coal Co.* (1919, Pa.) 107 Atl. 858.

The fact that an employee was under a physical disability when injured does not prevent recovery under most statutes, even if the injury could not have happened but for the disability. *Bell v. Hayes-Ionia Co.* (1916) 192 Mich. 90, 158 N. W. 179; see (1918) 28 YALE LAW JOURNAL, 98. Nor, in general, does the fact that a previous disability is responsible for the serious nature or length of the illness resulting from the injury prevent recovery for the whole period. *Hills v. Oval Wood Dish Co.* (1916) 191 Mich. 411, 158 N. W. 214. Likewise, even if the effect of the injury was only to accelerate slightly the operation of natural causes which would in any case have incapacitated the employee. *Peoria Ry. Terminal Co. v. Industrial Board* (1917) 279 Ill. 352, 116 N. E. 651; but see (1917) 27 YALE LAW JOURNAL, 578. So also in England. *Hughes v. Clover, Clayton and Co. Ltd.* (1909, C. A.) 2 K. B. 798. The rule in most jurisdictions seems to be that where the "injury" was in any way a cause—where the incapacity or death would not have occurred at that time and place without it—the fact that there were other causes is immaterial. The court in the instant case was certainly safe in ruling that the mere existence of another cause, the syphilitic condition of the employe, *did not necessarily preclude* recovery. In Pennsylvania it is not necessary that the injury arise "out of" the employment. Pa. Laws, 1915, sec. 201; *Lane v. Horn & Hardart Baking Co.* (1918) 261 Pa. 329, 104 Atl. 615. So the court ruled that, *irrespective of anterior causes,* the rupture was such "accidental violence to the physical structure of the body" as was provided for by the statute. It was not therefore necessary to find that anyone of the three anterior causes suggested by the report, or any other cause arising out of the employment, was responsible for the injury. Here the case was distinguished from these minority courts which hold that if the immediate cause of the incapacity is a disease, there can be no recovery, even if that disease is itself the result of conditions of the employment. See (1917) 27 YALE LAW JOURNAL, 144. In regarding the immediate cause of the injury—an effect of anterior causes—the court has failed to recognize that accidents are marked essentially by the nature of their anterior causes—a fall, rather than a disease—and not necessarily by their effects—a rupture, rather than a less violent death. The effect of the interpretation is that it is not now necessary in Pennsylvania to find any *cause* in any way connected with the conditions of the employment. In most jurisdictions this *is* necessary. *Kimbal v. Industrial Accident Commission* (1916) 173 Calif. 351, 160 Pac. 150. Under the present Pennsylvania rulings, the conclusion is now logically necessary that if an employee dies suddenly at any time during his employment, as a result of a preëxisting disease, the employer must give compensation. Yet the court disavows any intention so to rule. See also *McCauley v. Imperial W. Co.* (1918) 261 Pa. 312, 328, 104 Atl. 617, 622. And it must be recognized that such a result would be compulsory insurance of employes by employers. See Corwin, *Social Insurance and Constitutional Limitations* (1917) 26 YALE LAW JOURNAL, 431.